United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1594

United States Court of Appeals

FOR THE SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,

Appellee,

against

JOHN DEGRAFFENRIED,

Appellant.

On Appeal from the United States District Court for the Southern District of New York (MacMahon, J.)

BRIEF FOR APPELLANT JOHN DEGRAFFENRIED

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Preliminary Statement

John Degraffenried ("Degraffenried" or "defendant") appeals from a judgment of conviction entered on December 11, 1975, in the United States District Court for the Southern District of New York, following a two-day trial before the Hon. Lloyd F. MacMahon, United States District Judge, and a jury.

The indictment in this case charged Degraffenried with one count of forging the endorsement of the payee of a United States Treasury check for the purpose of obtaining the sum of $265 from the United States, in violation of 18 U.S.C. § 495.

Judge MacMahon sentenced Degraffenried, who had no prior record, to a two-year term of imprisonment on December 6, 1976. He is presently serving his sentence.

Issue Presented for Review

Was the defense so prejudiced by the trial judge's (a) comment in the presence of the jury that the defendant's testimony was "unbelievable", and (b) his intemperate remarks directed toward defense counsel, as to require a reversal of the conviction?

Statement of the Case

A. Facts Relevant to Guilt or Innocence

At the time of trial, defendant was twenty-six years old, had been employed as a messenger in the office of a New York State Assemblyman for a number of years, and had no prior criminal record. (Tr. 184-87).*

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* The prefix "Tr." denotes citations to the record. The prefix "App." denotes a reference to the ap-

The following is a summary of the testimony concerning the crime charged and the defense's claim of coercion. In February of 1974, defendant shared an apartment with his brother and sister-in-law. Sometime during the morning of February 5, 1974, he found on the staircase of his apartment building a United States Treasury check payable to "George Knox." Degraffenried testified that he observed that the envelope containing the check had been opened and the check had already been endorsed. He did not know George Knox. (Tr. 194-96).

Upon returning to his apartment, Degraffenried showed the check to his sister-in-law and then placed it on the dresser in his bedroom, intending to turn it over to the Assemblyman for whom he worked upon his arrival at work later that day, or to a Mr. Greene of the Police Association. (Tr. 133-34, 197-98).

Later that morning, a William Lawrence ("Lawrence") came to the apartment. Lawrence was a friend of Palmis Degraffenried, the defendant's brother, and a "dealer" in

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(Continued)

pendix. If a reference is made either to a portion of the court's charge to the jury or to a portion of the record reproduced in the appendix, both record and appendix page numbers will be provided.

valium pills. At some point, Lawrence approached defendant and demanded the sum of $14.00 which defendant owed him from a prior sale of pills. When Degraffenried responded that he did not have any money, Lawrence, in the presence of both Palmis and his wife Gloria, removed a gun from his coat pocket. He told defendant, "You're going to give me my money today or you're going to get it from somewhere." (Tr. 132-38, 171-75, 198-203).

Palmis Degraffenried, fearing for the safety of his wife and child, ordered Lawrence to leave the apartment and to take defendant with him. As defendant went into the bedroom to get his coat, Lawrence followed closely behind him with his hand on the gun in his coat pocket. Anticipating that he would probably go to work before returning to his apartment, defendant took the check with him. (Tr. 203-04).

Lawrence was clearly "high" as the two left the apartment. To appease Lawrence, whom he feared would use the gun if provoked, defendant testified that he showed him the check. Lawrence then told him that he had an identification card on file at Rite Check Cashing Company ("Rite") at 275 West 145th Street, and that he could get the check cashed for him. (Tr. 204-07). As the two arrived at Rite, Lawrence went inside and told Mr. Howard

Stein ("Stein"), President of Rite, that he was a customer and would vouch for his friend with the check. (Tr. 21). Stein testified that Lawrence appeared to have been drinking. (Tr. 31).

With Lawrence standing nearby, defendant, representing himself to be George Knox, presented the check to Stein for encashment. In response to Stein's request for identification, defendant stated that he had none. Stein then asked him to resign his name on the check. Defendant did so, misspelling the name "George." For this reason, and because the second endorsement was not compatible with the signature already on file for George Knox, Stein telephoned the postal authorities. (Tr. 18-20).

Stein then delayed the two individuals until the arrival about fifteen minutes later of Special Investigators Cooper and Rosa. Defendant and Lawrence were then placed under arrest.*

Testimony at trial established that defendant well knew that he could not successfully cash the check

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* Although a subsequent search of Lawrence by the postal authorities failed to turn up the gun, the evidence shows that at one point prior to the arrival of the investigators, Lawrence left the Rite premises for a period of time. (Tr. 215-16).

at Rite. The store was located only three blocks from his residence and directly across the street from the Assemblyman's Office where defendant had worked for about four years. Indeed, defendant himself had an identification card on file at Rite and had cashed his own checks there on numerous occasions. Degraffenried testified that he knew by sight all the individuals who worked at Rite, including Stein. He was further aware, from a sign prominently displayed in the establishment, that he would be photographed by a Regiscope camera as he presented the check. (Tr. 186, 207-11).

From previous dealings at Rite, defendant fully expected to be asked to produce identification before any check would be cashed. Clearly, he had no identification in the name of George Knox. Further testimony, supported by defendant's inability to correctly spell the name of the payee, established that he made no effort to match the signature on the second endorsement with that on the first. (Tr. 210-12).

Following his arrest, defendant was subjected to a battery of interrogations by federal authorities. He made statements first to postal inspectors, then to agents of the United States Secret Service, and the following day to an Assistant U. S. Attorney. (Tr. 52-55,

83-88, 102-10). These statements, all made before he was arraigned on the charges or assigned legal counsel, were not inconsistent with his defense.

B. The Conduct of the Trial Judge

The trial in this case was marked by a slew of highly prejudicial remarks by the trial judge which mandate a new trial. The first occurred during the cross-examination of Palmis Degraffenried, defendant's brother. The court, apparently disturbed by the tenor of an evidentiary objection raised by defense counsel, called him to the bench for a side-bar conference. Thereupon the trial judge threatened to hold the attorney in contempt, stating that his affiliation with Legal Aid "[did not] mean a damn thing to [the court]." Concerned that the judge's side-bar comments were "within the hearing of the jury," defense counsel properly requested that his observation be reflected in the record. This request was greeted by the trial court's comment that the defense counsel was "just an outright liar." Defense counsel then moved for a mistrial on the basis of the judge's remark. This motion was ignored by the judge, and the cross-examination of Palmis Degraffenried continued. (App. 13-14, Tr. 179-80).

Following the testimony of the defendant himself, the defense rested its case, and counsel renewed his motion for a mistrial on the basis of the court's earlier characterization of him as a "liar." (App. 15-16, Tr. 227-28). Additionally, counsel sought a mistrial on the basis of a comment made by the judge, seconds after calling the then-pending recess, but in the presence of the jury.

MR. THAU [Defense Counsel]:

* * *

> "But in addition thereto, your Honor, as the defendant was getting off the stand and Juror No. 7 was passing you by, right after you called this very short recess we are on now, your Honor said to the Court Reporter, who was then standing at the bench, "Unbelievable. Unbelievable."
>
> Now, I am sitting some 30 feet away from your Honor. I am not eavesdropping on the Court's conversations, but I assert to you, and I would take an oath to it, that I heard it.
>
> THE COURT: You heard me say "unbelievable" or "incredible"?
>
> MR. THAU: Yes.
>
> THE COURT: You sure did, but it wasn't with reference to you.
>
> MR. THAU: Perhaps not. I am not saying that it definitely was, but the point is that the defendant had just gotten off the stand and Juror No. 7 was perhaps within five feet or seven feet, let's say, your Honor as she was getting out of the jury box." (App. 16-17, Tr. 228-29).

This motion precipitated a tirade by the judge against defense counsel. The court granted defendant's motion for a mistrial, ordered defense counsel removed from the case and requested that counsel never again appear before him. The judge labelled defense counsel "an accomplished incompetent," "a wise guy," and once again an "outright liar." The court later referred to him as a "punk" and accused him of "talking to the Court of Appeals." (App. 17-18, Tr. 229-30).

Following these and other denunciations by the trial judge, counsel withdrew his motion for a mistrial. The court, having already decided to preside at the retrial of the case, then inquired of the defendant whether he wanted "a new trial with a new lawyer" or whether he wanted "to go on with this one." The defendant responded that he did not know what to say, at which point he conferred with his attorney. The defendant asked that the pending trial proceed, because it would be inconvenient for his sister-in-law to testify at a subsequent time. (App. 17-21, Tr. 229-33).

The court decided to continue the trial following a voir dire of the jury. The jury was asked by the trial judge whether it had heard anything which either he or counsel had said during any bench conferences.

The court's inquiry failed to include any reference whatsoever to his unfortunate characterization of the defendant's credibility. In response to the court's inquiry, Juror No. 4 indicated that he had heard the court say "'Stop it,' ... or some such thing." The court then accepted the defendant's "waiver." (App. 22-23, Tr. 234-35).

The trial continued, and following the court's charge to the jury, defense counsel took an exception to a portion of the trial judge's instruction on the issue of credibility which suggested that the defense witnesses had committed perjury. (App. 27, 39, Tr. 267, 279). Following its deliberations, the jury returned with a verdict of guilty to the crime charged.

ARGUMENT

THE TRIAL JUDGE'S (A) COMMENT IN THE PRESENCE OF THE JURY THAT THE DEFENDANT'S TESTIMONY WAS "UNBELIEVABLE", AND (B) HIS INTEMPERATE REMARKS DIRECTED TOWARD DEFENSE COUNSEL, SO PREJUDICED THE DEFENSE AS TO REQUIRE A REVERSAL OF THE CONVICTION.

A. THE TRIAL JUDGE'S COMMENT IN THE PRESENCE OF THE JURY THAT THE DEFENDANT'S TESTIMONY WAS "UNBELIEVABLE" SO PREJUDICED THE DEFENSE AS TO REQUIRE A REVERSAL OF THE CONVICTION.

There is no dispute that the trial judge twice

used the word "unbelievable" in the presence of the jury immediately after the defendant testified. Indeed, the court admitted this when it advised defense counsel that the remark was not made in reference to him. (App. 16, Tr. 228).

From the circumstances under which it was made, the court's statement can only be viewed as a decisive, negative comment upon the defendant's credibility. Defense counsel's unchallenged account of the incident indicates that the judge directed the remark to the Court Reporter as the defendant was leaving the witness stand and Juror No. 7 was passing within five to seven feet of the judge after a recess had been called. Counsel noted that he heard the judge's comment from as far as thirty feet away. (App. 16-17, Tr. 228-29).

The foregoing account remains uncontradicted in the record. Neither the trial court nor the Assistant U.S. Attorney challenged these facts as recounted by defense counsel.* Thus, the characterization given the

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* It should be noted that when Mr. Thau, at side-bar, placed in the record what he had seen and heard, he acted in accordance with the procedure set down by the Court of Appeals for the District of Columbia in Billeci v. United States, 184 F.2d 394, 402 (1950). There the court noted:

(Footnote continues)

matter by the defense counsel at the time of its occurrence must be considered accurate. Vinci v. United States, 159 F.2d 777, 779 (D.C. Cir. 1947); see also Billeci v. United States, 184 F.2d 394, 402 (D.C. Cir. 1950).

The facts support a compelling inference not only that the remark was made in direct reference to defendant's testimony, but also that it was sufficiently audible for at least one juror to have overheard. The latter inference can in no way be rebutted by the trial court's later voir dire of the jury. The trial court's inquiry, as the record shows at that time was a very narrow one:

> "Have any of you heard anything that has been said here at the bench when I have had counsel up here? Have any of you overheard anything that I have said or that counsel have said? If so raise your hand." (emphasis added) (App. 22, Tr. 234).

(Footnote continued)

> "It is our view that if the intonations and gestures of a trial judge are erroneously detrimental to a defendant in a criminal case it is the duty of counsel to record fully and accurately, at the time and on the record, although not in the hearing of the jury, what has transpired. In such a situation it is as much his duty to make that record as it is his duty to record his objections to the charge, as the Rules require, before the jury leaves the room. If the representations then made by counsel are not accurate, the court may say so."

The harmful statement was clearly not made during a side-bar conference with counsel. Mr. Thau's uncontroverted account establishes that the characterization was addressed to the Court Reporter while counsel were at their respective trial tables. (App. 16, Tr. 228). Moreover, the voir dire was completely lacking in any reference, direct or indirect, to the court's evaluation of the defendant's story. The trial judge's conduct in adversely commenting upon the defendant's credibility in this manner, we submit, so prejudiced the defense as to have made a fair trial impossible.

It is readily apparent that the trial court's prejudicial statement here can in no way be justified as an attempt to either clarify testimony or assist the jury in understanding the evidence. United States v. De Sisto, 289 F.2d 833, 834 (2d Cir. 1961). The remark was wholly gratuitous and apparently designed for no conceivable purpose other than to demean the defendant's testimony. The judge's conduct was a far cry from "that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of court, counsel and jury." Offutt v. United States, 348 U.S. 11, 17 (1954); United States v. Dellinger, 472 F.2d 340, 386

(7th Cir. 1972), cert. denied, 410 U.S. 970 (1973); see also ABA Standards Relating to the Function of the Trial Judge § 6.4 (Approved Draft 1972). The remark in issue was unnecessary and devoid of even a colorable claim to proper trial administration.

The privilege of a trial judge to comment on the facts of a criminal case has its inherent limitations. Quercia v. United States, 289 U.S. 466, 470 (1933); United States v. Nazzaro, 472 F.2d 302, 303 (2d Cir. 1973). Inasmuch as "[t]he influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling'" [United States v. Grunberger, 431 F.2d 1062, 1068 (2d Cir. 1970), quoting Quercia v. United States, supra, at 470; see also United States v. Ah Kee Eng, 241 F.2d 157, 161 (2d Cir. 1957)], his privilege of comment must be tempered with effective safeguards against abuses. This Court thus has been diligent in ensuring that the trial judge remain

> "impartial, judicious, and, above all, responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested. Because of his proper power and influence it is obvious that the display of a fixed opinion as to the guilt of an accused limits the possibility of an uninhibited decision from a jury of laymen much less initiated in trial procedure than he.

> He must, therefore, be on continual guard that the authority of the bench be not exploited toward a conviction he may privately think deserved or even required by the evidence."

United States v. Brandt, 196 F.2d 653, 655-56 (2d Cir. 1952).

This Court, moreover, has been constrained to reverse convictions in which the fact-finding function of the jury has been usurped by the trial judge. United States v. DeSisto, supra, at 834. Trial courts in this circuit have been repeatedly cautioned that they should be careful to preserve an attitude of impartiality and guard against communicating to the jury any impression that the court believes the defendant to be guilty. United States v. Natale, 526 F.2d 1160, 1169 (2d Cir. 1976); United States v. Nazzaro, supra, at 304; see also ABA Standards Relating to the Function of the Trial Judge § 5.6(a) (Approved Draft 1972). Particularly susceptible to reversal are trials in which the judge, either directly or indirectly, impugns the credibility of the defendant or defense witnesses. See, e.g., United States v. Nazzaro, supra, United States v. Grunberger, supra, United States v. Guglielmini, 384 F.2d 602 (2d Cir. 1967); United States v. Persico, 305 F.2d 534 (2d Cir. 1962); United States v. Salazar, 293 F.2d 442,

444 (2d. Cir. 1961), United States v. DeSisto, supra.; United States v. Brandt, supra. And, this susceptibility is not altered even in cases were there is strong evidence supporting the guilty verdict. United States v. Guglielmini, supra, at 604 ("proof amply supported the verdicts of guilty"); United States v. Salazar, supra, at 442 ("abundant proof of ... guilt").

The foregoing rulings are indicative of the variety of means by which the trial court's disbelief in the defendant's theory of his case might be conveyed to the jury. Acrimonious exchanges between the trial judge and defense counsel, for example, can give the jury the impression that defendant's case is of little substance. United States v. Nazzaro, supra, at 312; United States v. Guglielmini, supra, at 605; United States v. Persico, supra, at 537; United States v. Coke, 339 F.2d 183, 195 (2d Cir. 1964). Likewise, an extended cross-examination of the defendant or his witnesses [United States v. DeSisto, supra, at 834-35; United States v. Grunberger, supra, at 1067-68], or the attempted rehabilitation of prosecution witnesses by the trial judge [United States v. Nazzaro, supra, at 308] can give the jury a sense of the court's partisanship.

The instant case presents a much more unam-

biguous type of misconceived participation by the trial judge. The jurist here would have committed no greater error had he charged the jury that he believed defendant's testimony to be incredible. Such a situation arose in Quercia v. United States, supra. In that case, the Supreme Court reversed a conviction on the ground that the charge to the jury included a statement by the trial judge that he thought that "every single word [the defendant] said, except when he agreed with the Government's testimony, was a lie." 289 U.S. at 468. Cf. United States v. Woods, 252 F.2d 334, 336 (2d Cir. 1958).

In two prior situations this Court was faced with trial court conduct which was akin to the trial judge's here: United States v. Salazar, supra, and United States v. Brandt, supra. In Salazar, the trial court expressed a clear disbelief in the defendant's testimony in a colloquy which took place during the defendant's direct examination:

> "THE COURT: Let me ask you, Salazar - don't misinterpret my remarks, either you or the jury - but you seem to be bearing a bit of a chip on your shoulder.
>
> SALAZAR: I am not carrying - I'm sorry to interrupt you.
>
> THE COURT: I mean, you feel you want me and the jury to believe that all these people in the Post Office Department and the United

> States Attorney's Office, and the postal inspectors are in a gigantic conspiracy to frame you?" 293 F.2d at 443.

Emphasizing that these and other "remarks of the judge were wholly unnecessary" and "not called for by the defendant's conduct on the stand" [id. at 444], this Court reversed the defendant's conviction. Then Chief Judge Lumbard reasoned that

> "[b]y attributing to Salazar the argument that the Post Office Department and the United States Attorney's Office had joined together to frame him, the judge made Salazar's eventual fate at the hands of the jury almost inevitable." Id. Accord, United States v. Woods, supra, at 336.

In Brandt, this Court observed that the examination of defense witnesses by the trial judge was "spotted with a number of remarks which were not of the form to elicit information or direct the trial procedure into proper channels, but rather to cut into the presumption of innocence to which defendants are entitled." 196 F.2d at 656. For example, the trial judge accused one of the defendants of a "stage play" in his testimony. Id. at 656 n.1. To another witness favorable to the defense, the trial court observed: "You remember a lot this afternoon that you didn't remember this morning, Mr. Telchin, don't you?" Id. On the basis of these and other improprieties, this Court found that the trial

judge breached his "mandate of judiciousness" [id.] and thus reversed the convictions.

The Government will undoubtedly argue that on the face of the record, the defendant "waived" this issue on appeal. Preliminarily, we note that this Court has reversed convictions based upon similar judicial misconduct where no objection whatsoever was made by the defendant at trial. United States v. Grunberger, supra, at 1068-69. It is difficult to perceive why a "waiver" of an objection would be treated any differently.

In any event, the "waiver" should not be given effect in light of the hostile circumstances under which it was made. Defense counsel's offer to waive his objection to the judge's conduct came at the end, and undoubtedly as a result, of a barrage of degrading insults directed at him by the trial judge. In addition to having just been labelled an "outright liar" (App. 14, 17, Tr. 180, 229), an "accomplished incompetent", a "wise guy" and a "punk", defense counsel was instructed by the trial judge never to appear before him again. (App. 17-18, Tr. 229-30).

Defense counsel's decision to capitulate on the "waiver" was also undoubtedly influenced by the trial judge's clear intention to preside over defendant's

retrial. (App. 17, Tr. 229) In the face of this questionable decision by the court, defense counsel might have been legitimately concerned that the judge's animosity toward him would adversely affect his client's rights at that subsequent trial. Moreover, any retrial before the same trial judge would necessarily be colored by the court's previously expressed opinion of the defendant's version of the facts.

The "waiver" is further tainted by the Hobson's choice which the trial judge offered the defendant.

> "THE COURT: Mr. Degaffenried, what do you say? Do you want a new trial with a new lawyer or do you want to go on with this one?" (App. 20, Tr. 232).

Thus, the defendant's only alternative to continuing with a trial permeated with error was to go to trial with a new lawyer. The trial court thus did not give the defendant the option of being represented by his attorney at a new trial. It is entirely possible that the defendant was satisfied with the manner in which Mr. Thau had conducted his defense and would have wanted him to continue as his attorney. One of the alternatives proposed by the court below, then, could have effectively denied defendant his right to be represented by counsel of his own choice. See United States v. Armedo - Sarmiento, 524 F.2d 591, 592 (2d Cir. 1975); United States v. Wisniewski,

478 F.2d 274, 285 (2d Cir. 1972). Any waiver made under these strained circumstances must be considered ineffective.

Nor can the Government claim that the trial court's remarks were cured by his instructions in his charge to the jury that he had "no opinion one way or the other as to what the outcome of this case should be," and that they "alone determine what effect and what value [they] will give to the evidence." (App. 24, Tr. 264). Such cautionary instructions have been held to be insufficient to sanitize a jury exposed to such prejudical conduct on the part of the trial court. Quercia v. United States, 289 U.S. at 472; United States v. Grunberger, 431 F.2d at 1068; United States v. Persico, 305 F.2d at 537 ("hard" charge held insufficient to erase prejudicial effect); United States v. Woods, 252 F.2d at 336 (triple instruction that jurors sole triers of the fact held insufficient). As noted by this Court in United States v. Brandt, supra, "[s]uch admonitions may offset [only] brief or minor departures from strict judicial impartiality . . . ." 196 F.2d at 656; United States v. Nazzaro, 472 F.2d at 312-13.

Moreover, any curative effect which these instructions may have had upon the jury was completely

undermined by a totally inappropriate comment made by the trial judge at a later point in the charge. On the issue of credibility of witnesses, the court suggested certain questions which the jurors might ask themselves:

> "Was the witness giving you straight answers to straight questions or was he just parroting answers? Was the lawyer putting words in his mouth? (App. 27, Tr. 267).

Although this instruction does not on its face refer specifically to the defense, in light of the judge's attitude toward the defense case throughout the trial the jury could have drawn but one inference. In essence, the court was intimating to the jury that the defense witnesses had committed perjury. Counsel properly took an exception to that portion of the court's charge. (App. 39, Tr. 279).

It can thus be seen that the trial judge's comment in the presence of the jury that the defense testimony was "unbelievable", followed by his intimation in the charge that the defense witnesses had perjured themselves, made the defendant's fate at the hands of the "triers of the fact" almost inevitable.

Moreover, the suggestion in the above-quoted portion of the charge that defense counsel encouraged the perjury of his witnesses was typical of the trial

judge's hostile attitude toward defense counsel throughout the trial. As will be shown below, this attitude compounded the prejudice to the defendant and affords this Court yet another basis upon which to reverse the instant conviction.

B. THE TRIAL JUDGE'S INTEMPERATE REMARKS DIRECTED TOWARD DEFENSE COUNSEL SO PREJUDICED THE DEFENSE AS TO REQUIRE A REVERSAL OF THE CONVICTION.

During the cross-examination of Palmis Degraffenried, the defendant's brother and a key witness for the defense, the Assistant U. S. Attorney, in an apparent attempt to establish that the defendant was a heroin user, inquired of the witness whether he had ever seen his brother "walk around the apartment without his shirt on?" To this, defense counsel objected, adding that it was "not a nudity case or obscenity case." Apparently disturbed with the addendum to the objection, the court called him to the bench, whereupon the following colloquy took place:

> "THE COURT: I want you to quit making those remarks. I know that other judges must let you get away with this, but if you do it once more I am going to hold you in contempt. Now, you stop it. You know better. You have been around here for four or five years. If you have got an objection, make it. Don't

stand up and say, 'This isn't a nudity case.' Now don't do it again. You may be Legal Aid, but that doesn't mean a damn thing to me. You stop it.

MR. THAU: I am not taking special license --

THE COURT: You stop it.

MR. THAU: May the record show that you have said this so loudly that even though it is at the bench it is within the hearing of the jury?

THE COURT: You are just an outright liar.

MR. THAU: I beg your pardon?

THE COURT: Proceed.

MR. THAU: I hope that is on the record.

THE COURT: I hope it is, too.

MR. THAU: I move for a mistrial on the statement just made by the Court that I was an outright liar.

MR. SCHATZ: It is clear to me that the jury did not hear your Honor's comments.

THE COURT: Of course not." (App. 13-14, Tr. 179-80).

This Court has recognized that recriminations and displays of temper toward defense counsel can reach a point where the jury cannot help but be prejudiced thereby. United States v. Nazzaro, 472 F.2d at 311-12; United States v. Persico, 305 F.2d at 537; United States v. Ah Kee Eng, 241 F.2d at 161. Moreover, this Court has been less likely to excuse such conduct where, as here, the Court's remarks are either wholly unnecessary

[United States v. Guglielmini, 384 F.2d at 605] or unprovoked by trial counsel [United States v. Coke, 339 F.2d 183, 185 (2d Cir. 1964); cf. United States v. Persico, 305 F.2d at 540].

The trial court called defense counsel an "outright liar" because he purportedly misrepresented that portions of the foregoing conference were "within the hearing of the jury." (App. 14, 17, Tr. 180, 229). Upon an inquiry of the jurors later in the trial as to whether they did overhear portions of any side-bar conferences, Juror No. 4 answered that he had heard the judge say "'Stop it' . . . or some such thing." (App. 22, Tr. 234). The record shows that on three occasions during the conference the judge said to Mr. Thau: "You stop it." (App. 13-14, Tr. 179-80). From the face of the record, then, it appears that defense counsel's representation that a juror might have overheard parts of the conference was accurate. Hence, the trial judge's characterization of Mr. Thau as an "outright liar" seems most unjustified.

Appellate courts, concerned with the potential for prejudice, have shown an increased tendency to scrutinize the content of bench conferences. In Young v. United States, 346 F.2d 793 (1965), for example, the

District of Columbia Circuit overturned a conviction on the basis of the trial court's criticism of defense counsel at a bench conference. At one point in the trial defense counsel attempted to establish the suggestiveness of an on-the-scene show-up by showing that the defendants were handcuffed when the identification was made. At that point in the examination, the court called counsel to the bench and stated, "You just want to be nasty to cast imputations on the police force. Now stop doing that. . . . And using the word shackle. You owe that police officer an apology, really." Id. at 795.

At the outset of the trial the following day, defense counsel approached the bench and informed the court that a number of spectators who were in the courtroom the preceding day had told him that they overheard portions of the bench conferences. Counsel then moved for a mistrial, which was denied by the court. On appeal, the D.C. Circuit reversed the conviction on the ground that it could not "say with sufficient confidence that the jury did not hear the court's remarks and were not thereby prejudiced." Id. at 796.

The rationale used by the court in Young requires a reversal of the conviction here. It is apparent that the substance of the offending side-bar statements

in Young were innocuous compared to the trial judge's utterances in this case. Moreover, Young establishes that absolute proof that a juror in fact overheard the prejudicial statement is not a condition precedent to reversal. This should be particularly so in cases where the trial judge's actions are both indefensible and a substantial departure from proper judicial conduct.

The trial judge's inquiry of the jury in the instant case does not factually distinguish it from Young. His examination of the jury was wholly inadequate. (App. 22, Tr. 234). Initially, an examination of each juror should have been conducted out of the presence of the others. United States v. Accardo, 298 F.2d 133, 136 (7th Cir. 1962). The examination should further have taken place immediately following defense counsel's first request for a mistrial. (App. 14, Tr. 180). Cf. United States v. Green, 429 F.2d 754, 761 (D.C. Cir. 1970). Moreover, whereas the court established that Juror No. 4 did in fact overhear portions of the bench conference (App. 22, Tr. 234), he made no attempt to determine whether the juror was in fact prejudiced by so strong a comment. Young v. United States, supra, at 796; United States v. Accardo, supra, at 136. Nor did the court instruct Juror No. 4 to disregard the information which

improperly came to his notice. Young v. United States, supra, at 796 (Danaher, J., concurring). These defects clearly serve to negate any remedial effect which such an inquiry might have had upon a jury.

This Court, too, frowns upon hostile interactions between the trial court and defense counsel during bench conferences. In United States v. Nazzaro, supra, this Court was critical of a side-bar conference which "may have been overheard by the jury." 472 F.2d at 312. The only indication in that case that the jury had overheard the prejudicial statements was a comment by defense counsel to that effect during the course of the conference. Id. In United States v. Boatner, 478 F.2d 737 (2d Cir.), cert. denied, 414 U.S. 848 (1973), this Court expressed disapproval of a side-bar conference during which the court labelled the defense counsel "disgusting and shyster-like" and "denounce[d]" counsel for "creat[ing] a reason for a mistrial." Id. at 740; see also id. at 739.

Without reciting the entire text of the intemperate, eight-page exchange which occurred between the trial judge and defense counsel near the end of the

trial (App. 15-22, Tr. 227-34),* it need only be suggested that such conduct by the court may well have "tended . . . to unnerve [defense counsel] and throw him off balance so that he could not devote his best talents to the defense of his client." Young v. United States, 346 F.2d at 795; United States v. Kelley, 314 F.2d 461, 463 (6th Cir. 1963).

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* A flavor of that exchange can be derived from the following passage:

> "THE COURT: Mr. Thau, I am going to grant your motion for a mistrial and with the request that you never appear before me again. I think you are an accomplished incompetent as well as being a wise guy and outright liar.
>
> * * *
>
> MR THAU: Would your Honor elaborate on why I am a liar? In my 12 years at the bar --
>
> THE COURT: Because you outright misrepresented. I was speaking in a whisper here. I was just admonishing you for your constant disregard of my directions to you, to stop making remarks.
>
> MR. THAU: I don't know if the jury heard. I didn't say they heard.
>
> THE COURT: You don't know it, but you asserted it up here on the record.
>
> MR. THAU: I was in fear --
>
> THE COURT: You asserted it on the record. You are talking to the Court of Appeals, trying to make a point like any punk, not as a lawyer who represents Legal Aid, and not like the kind of lawyer I like to see assigned to defend somebody in my cases. That is why." (App. 17-18, Tr. 229-30).

Defense counsel's trial performance on behalf of his client was also undoubtedly hampered by the constant admonishments by the trial judge to expedite the proceedings. On more than one occasion, the court remarked that the case was a "simple" one and was being unnecessarily drawn out by the defense (e.g., Tr. 45, 56, 69, 75, 76-77, 99). In addition, the court improperly and unnecessarily restricted summations to a maximum of fifteen minutes. (Tr. 241-43). This Court has noted that a trial judge's concern "for speedier trials of criminal defendants" will not justify judicial conduct of the sort experienced in this case.

> "These [speedy trial] pressures can cause even conscientious members of the bench, such as the trial judge in this case, in their anxiety to keep pace with the flood of litigation to give vent to their frustrations by displaying anger and partisanship, when ordinarily they are able to suppress these characteristics. But grave errors which result in serious prejudice to a defendant cannot be ignored simply because they grow out of difficult conditions." United States v. Nazzaro, 472 F.2d at 304.

This Court, understandably, ordinarily will be reluctant to reverse a judgment of conviction because of a trial judge's alleged mishandling of a case. We are constrained to urge, however, that the undisputed facts in this case call for the taking of such action.

CONCLUSION

The judgment of conviction should be reversed.

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